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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
v.
HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL., PETITIONERS
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT AND THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NON-GOVERNMENT PARTIES

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents in Case 13-354 ("*Hobby Lobby*")[2] and Petitioners in Case 13-356 ("*Conestoga*")[3]. He has recently suggested certiorari in the case of *Easton v. Hawk*,[4] *see* his amicus brief there *passim*,[5] partially in order to protect children from the abuses of an oversexualized and dangerous atmosphere. However, not just born children, but unborn, too, may deserve protection, as may those who value the lives of the unborn; hence this brief, supporting exemptions from the "contraceptive mandate" ("the Mandate") found in 42 U.S.C. § 300gg-13(a)(4) and federal regulations mentioned in, e.g., the January 10, 2014 Brief for Petitioners in 13-356 at 6, *see id.*

The non-Government parties may be referred to here as "Plaintiffs" or "Hobby/Conestoga".

SUMMARY OF ARGUMENT

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is on record with the Court except from Hobby Lobby, who granted Amicus permission by e-mail.

[2] *Kathleen Sebelius, Sec'y of Health and Hum. Servs., et al. v. Hobby Lobby Stores Inc., et al.*, 723 F.3d 1114 (10th Cir. 2013) (en banc) (*cert. granted*, 82 U.S.L.W. 3328).

[3] *Conestoga Wood Specialties Corp. et al. v. Kathleen Sebelius, Sec'y of Health and Hum. Servs., et al.*, 724 F.3d 377 (3rd Cir. 2013) (*cert. granted*, 82 U.S.L.W. 3328).

[4] *Easton Area Sch. Dist. v. B.H., a Minor, By and Through Her Mother, Jennifer Hawk, et al.*, 725 F.3d 293 (3d Cir. 2013), *pet. for cert. pending* (U.S. Dec. 5, 2013) (13-672).

[5] *Available at* http://tinyurl.com/EastonPrecertAmicusBrief.

In this somewhat nuanced set of cases, Plaintiffs are asking for less than their Questions Presented request: i.e., they ask for relief only from funding abortifacients. The Court should be careful, then, about whether it should grant relief from funding *every* contraceptive, even non-abortifacients. There are, however, reasons for allowing exemptions from funding any contraceptive that an employer may find morally objectionable, especially seeing that sexual relations without intention to procreate are an erotical and optional recreation, not a necessity.

Calendar-based contraceptive measures are apparently missing from the Mandate, showing a lack of compelling governmental interest, and perhaps a lack of comprehensive thought on these issues by the Government.

As even the brief for *Amici Curiae* Physicians for Reproductive Health et al. in Support of Petitioners in 13-354 (Oct. 21, 2013) inadvertently admits, *see id.* at 19, there is a chance that so-called contraceptives like Plan B or ella could cause an abortion, by the religious standards of Plaintiffs.

And the ensoulment of the embryo at conception, or at least the fully human status of the embryo, deserving respect and life, is an ancient, widespread, and continuing idea.

Thus, the Free Exercise Clause of the First Amendment, and "RFRA",[6] should allow Plaintiffs exemption from funding such abortifacients.

At the same time, to give blanket exemptions to any and all corporations, even huge ones, to deny

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[6] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.*

health care or other benefits on the alleged basis of religion, could be dangerous, and amount to a *sub silentio* overturning of *Employment Division v. Smith* ("*Smith*") (494 U.S. 872 (1990)). Keeping exemptions limited to small, closely-held businesses/corporations where the religious ethos of the owners pervades the company, may be prudent.

Plaintiffs might do well to articulate a limiting principle or principles for demands of the type they make, since, e.g., someone who objects to *all* health care on a religious basis could simply refuse all health care to his employees and claim religious exemption. Free-exercise and RFRA claims may be abused, after all, even though Hobby/Conestoga are not abusing such claims. (Such a limitation could draw on the fact, explored in various places in this brief, that abortifacients and contraceptives occupy a possibly-lewd, or deadly, sphere.)

As for gender equity: while it is crucial, still, there may be means to promote it besides killing one's own daughter (or son) in the womb, and dragooning one's employer into that effort. And if an abortion does take place, it does not have to be in the pre-implantation period covered by abortifacient contraceptives.

Though using certain abortifacients might *arguendo* help fight some forms of cancer, that might not be sufficient reason for forcing Hobby/Conestoga to fund those abortifacients, considering the possible killing of a baby or potential baby by those abortifacients.

And killing a preborn child also, one notes, kills all the possible descendants of the child over the centuries. *See, e.g.*, the case of Yitta Schwartz and

her 2000 living descendants, *infra* at 21. Some may wish to avoid such multi-generational slaughter.

Planned Parenthood of Southeastern Pennsylvania v. Casey ("*Casey*"), 505 U.S 833 (2003), and *Gonzales v. Carhart* ("*Carhart*"), 550 U.S. 124 (2007), show not only continued permission for abortion, but also respect for fetal life and the right to define one's values. The latter two items support Plaintiffs' right to refuse material support of abortions.

The American tradition, after all, in culture and law, is not to have to pay for others' abortions.

Casey, *supra*, also shows, *see id.*, that the great moral gravity of abortion has even bent scrutiny levels away from strict scrutiny, so that abortion-seekers may have to respect life more than in 1973. Similarly, then, those, like Hobby/Conestoga, seeking to respect life re abortion, may need to prove less in order to achieve their desired exemptions (or conversely, the Government may have to prove more in order to deny the exemptions).

There is, in the mind of the Government and its supporters, something bordering on a lack of imagination or sympathy *vis-à-vis* the horror of abortion in the eyes of Plaintiffs and other opponents of abortion. Examples from the worlds of literature, law reviews, and popular culture can help elucidate the horror of abortion, even the abortion of a tiny unimplanted embryo.

In light of the apparent unpleasant dilemmas in the instant cases, the Court's recent order in *Little Sisters of the Poor v. Sebelius*, No. 1:13-cv-02611-WJM-BNB (D. Colo.), shows that creativity and

moderation can craft a decent solution regarding these sorts of issues.

If, *arguendo*, the Court does not allow an exemption for Plaintiffs, it can still prevent the fine on them for noncompliance from being more than a nominal or minimal fee, considering due process and the circumstances, e.g., Plaintiffs' sincere disgust with having to materially support abortion.

In all, the Court should provide complete, or very substantial, relief to Plaintiffs, though considering the cases' nuances in order to avoid an overbroad or under-reasoned result.

ARGUMENT

I. ON THE OVERBROAD NATURE OF THE QUESTIONS PRESENTED, SINCE PLAINTIFFS SEEK FREEDOM ONLY FROM FUNDING ABORTIFACIENTS, NOT FROM FUNDING ALL CONTRACEPTIVES

Firstly, Amicus politely notes that Plaintiffs may shortchange themselves by asking in their Questions Presented, *see id.*, for relief from having to provide contraceptives. After all, they are really asking for a much smaller relief from the Court, since it is only *abortifacient* "contraceptives" such as Plan B or ella, that they refuse to fund. But those are only a small subset of the set of contraceptives in general, whether "regular" contraceptives, e.g., "normal" birth-control pills, or contraceptives which could withstand even strict Christian religious scrutiny, such as devices to assist with calendar-based contraception (popularly known as the "rhythm

method", and also known as "natural family planning" or "fertility awareness"), following the natural cycles of the body and thus avoiding artificial contraception.

So, some clarification, whether by Plaintiffs or by pronouncements of the Court, may be appropriate here. If Plaintiffs are given relief they weren't even asking for, e.g., freedom from funding *any* mandated contraceptives, that may look tortuous and unjust, and as if the Court had some bias against all contraceptives whatsoever, and is departing from the facts in the cases, by arbitrarily giving a blanket exemption from funding any contraceptive.

At the same time, there are legitimate reasons for offering a conscience exemption from employers' funding any contraceptive they believe is immoral. First, there are the pragmatic issues that: (1) the Questions Presented do imply a variety of contraceptives, even if Plaintiffs only want relief from funding abortifacients; and (2) there are multiple parties in other cases not immediately before the Court, who desire relief from funding any mandated contraceptive at all. Additionally, if those parties against contraception have to wait several years for another case to come before the Court where there are employer-plaintiffs who want relief from non-abortifacient contraceptives, they, and others, may feel that is just too long to wait, seeing the huge imposition on either their conscience, or their wallet, from the contraception mandate.

Second, contraceptives may be considered no true necessity under certain circumstances, since sexual relations are basically a voluntary activity. If sexual relations were a true human need like breathing or

food, then Mother Teresa, the Dalai Lama, and many of the popes, would have all dropped dead within a few weeks (or days) of becoming celibate. But they didn't, since sex is only a human want (like bowling or stamp collecting), not an actual *need*. So sex is merely optional—a sort of luxury good, especially when not making any babies, and contraception is meant to prevent babies—, and can be treated as such, at least for the sake of *forcing other people to subsidize it* (or subsidize related matters like contraception) besides the ones who are actually having sex. (Leisure activities, like bowling, are not without merit; but Amicus knows of no "Bowling Shoe Mandate". Thus, if sex is just leisure, not reproduction, why should there be a "Contraceptive Mandate" without any conscience exemptions?) If people like having carnal relations, perhaps they can pay for the consequences of it themselves, instead of making the unwilling, horrified employer pay.

After all, it is considered perverse to force someone to be a voyeur to a sexual situation, which is one reason there are laws against sexual intercourse, or other sexual acts, in public. But by making employers directly fund implements to be used in sexual acts, they are forced to be not just voyeurs, but actual *participants*, in a sense.

(Americans are still allowed to find lewdness disgusting, and the law is still allowed to treat lewdness as a disfavored category, *see generally, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (finding sexual material more proscribable than violent material).)

—These matters are controversial and sensitive, and Amicus thanks the Court in advance for a well-reasoned and sensitive treatment of the matters at hand, no matter which side wins the case.

And there may be other reasons as well to grant employers religious exemptions from funding any contraceptives.

II. THE MYSTERIOUS ABSENCE OF CALENDAR-BASED CONTRACEPTION FROM THE MANDATE

Some further attention is needed to calendar-based contraception, which has become more refined in recent decades, *see, e.g.*, Wikipedia, *Calendar-based contraceptive methods*.[7] E.g., *see id.*, there is the "Standard Days" method developed at Georgetown University, which is more effective than the traditional "rhythm method"; and there is now even a "Perimon" software, from Germany, for tracking female fertility cycles.

This form of contraception is not actually mandated by the Government, which is an interesting issue in itself. While calendar-based methods may not always be effective, or invasive, as barrier, drug, or surgical methods of contraception/defertilization, still, calendar-based methods could supplement barrier, drug, or surgical methods, even if not replacing them. *See Calendar-based contraceptive methods*, *supra*: "The Standard Days method (SDM) . . . is satisfactory for many women

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[7] http://en.wikipedia.org/wiki/Calendar-based_contraceptive_methods (as of 17:47 GMT, Jan. 15, 2014).

and men; offering it through family planning centers results in a significant increase in contraceptive use among couples who do not want to become pregnant." *Id.*

And calendar-based methods are natural ("organic", even), and thus avoid not only religious disapproval, they also avoid medical problems such as the increased risk of heart attack which some oral contraceptive pills cause.

The absence of calendar-based contraception from the Mandate raises an additional issue about how much of a "compelling interest" contraception really is for the State. If it is so compelling, why does the Mandate avoid mandating effective methods like calendar-based methods? (The pharmaceutical industry may like us to believe their pills and devices are the only way to prevent pregnancy; but that belief is false.)

(By the way, Amicus shall leave "strict scrutiny" matters like "compelling interest", "least-restrictive means", and "narrow tailoring" largely to others' briefs and commentary.)

III. THE CONTRACEPTIVES AT ISSUE CAN IN FACT BE ABORTIFACIENTS

Although some parties keep repeating that implantation, not conception, is "the proper" definition for when pregnancy occurs: that is obviously not Plaintiffs' definition. The Government (Petitioners') brief (January 10, 2014) in 13-354 explicitly admits that Plan B, ella, and the copper IUD can prevent implantation of a fertilized egg (zygote/blastocyte/embryo), *see id.* at 9 n.4; which, by Hobby/Conestoga's definition, means that a living

human is being thereby aborted. The Government also admits that the progestin IUD can "alter[ ] the endometrium [uterine lining]", *id.*, which could, *cf. id.*, inhibit implantation if that alteration makes the endometrium less welcoming to an embryo.

See also generally Br. of *Amici Curiae* Physicians for Reproductive Health, *supra* at 2, on, e.g., the copper IUD:

> When used as emergency contraception, the Cu-IUD could also act to prevent implantation, due to copper's effect of altering molecules present in the endometrial lining[; h]owever, studies show that the alteration of the endometrial lining prevents rather than disrupts implantation. . . . The Cu-IUD, just like any IUD, can produce an inflammatory response in the reproductive tract and uterus that is toxic for sperm and oocytes (eggs). . . . Critically, because neither IUD has been shown to disrupt pregnancy, they too are properly classified as contraceptives, not abortifacients.

Id. at 19 (citations omitted). Those *amici* support the Government, *see id.*, but ironically, their brief supports Hobby/Conestoga's contention that an abortion from Plaintiffs' point of view is indeed happening, *see id.*

IV. ENSOULMENT AND HUMANITY FROM THE MOMENT OF CONCEPTION: A BRIEF OVERVIEW

A secularist view may be that the embryo before (or during) implantation is just a microdot of flesh, or cells, that might evolve into a human being. However, the religious may follow the ancient, and non-disprovable, idea that there is also an invisible spirit, an individual soul given by God Himself, animating and fully humanizing that tiny ball of cells. Thus, Hobby/Conestoga and similar parties may be aghast that that ensouled little human, or possibly-ensouled little human, might not be given the chance to live. *See* Wikipedia, *Ensoulment*,[8] for a Catholic view, including the recognition that one cannot be sure exactly when ensoulment occurs,

> [R]ecent findings of human biological science . . . recognize that in the zygote resulting from fertilization the biological identity of a new human individual is already constituted. Certainly no experimental datum can be in itself sufficient to bring us to the recognition of a spiritual soul; nevertheless, the conclusions of science regarding the human embryo provide a valuable indication for discerning by the use of reason a personal presence at the moment of this first appearance of a human life: how could a human individual not be a human person? The Magisterium has not expressly committed itself to an affirmation of a philosophical nature, but it constantly

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[8] http://en.wikipedia.org/wiki/Ensoulment (as of 22:40 GMT, Jan. 2, 2014).

> reaffirms the moral condemnation of any kind of procured abortion. This teaching has not been changed and is unchangeable.

Id. (citation and footnote omitted)

Some Jewish religious opinion has also supported ensoulment at conception, *see id.*

Then again, the Talmud claims the fetus is just water for the first 39 days, *see* Wikipedia, *Judaism and abortion*.[9] However, this is scientifically refutable (e.g., ultrasound images showing the fetus is hardly just "water"), as some religious assertions are. Other religious assertions are not scientifically refutable, e.g., the existence of a soul, or the time of ensoulment. Plaintiffs deserve the benefit of the doubt.

V. THE NEED FOR A LIMITING PRINCIPLE RE RELIGIOUS EXEMPTIONS FROM INSURANCE COVERAGE

However, giving Hobby/Conestoga and similarly-situated persons or businesses a religious exemption from funding contraceptives does not mean that any businessperson can blithely claim a religious exemption from doing anything he claims to think is irreligious. There is a real slippery-slope possibility here, if the exemptions granted to Plaintiffs are not narrowly-enough drawn. Such exemptions, whether drawn from the Free Exercise Clause or RFRA, could effectively make *Smith*, *supra* at 3, a dead letter.

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[9] http://en.wikipedia.org/wiki/Judaism_and_abortion (as of 17:30 GMT, Jan. 25, 2014).

For example, if the principle that "you don't have to give or fund medical care if it offends your spiritual sensibilities" is given unrestricted rein, then some employers could refuse to fund homosexuals' medical care, especially if they honestly feel that the gay employees will just go out and commit sodomy again, instead of being driven to godly repentance on a deathbed due to AIDS—and due to lack of medical care.

Also, say, a Jehovah's Witness businessperson could refuse to fund blood transfusions for his employees. And furthermore, an extreme Christian Scientist might refuse *any and all* medical care, since such care might show lack of faith in "faith healing". So, Amicus hopes the Court gives careful, and appropriately narrow, rationales for any exemptions given to Hobby/Conestoga.

Some issues the Court may wish to consider as part of the whole picture: non-interruptability of emergency care or immediately-lifesaving care; forbiddance of "patient-identity-based" denial of care (e.g., based on race, gender, orientation, or religion of patient); and ability of healthcare employees (or others) to avoid certain types of assignments due to issues of conscience.

However, in the instant cases, there are relatively small companies with a strong religious ethos of which employees should be considered to have had fair warning, by the overt way that the owners conducted themselves. One might assign exemptions to the corporations themselves, although perhaps preferably, the exemptions could be traceable to the owners as individuals instead, so as not to bring up

possibly-unnecessary debates about the limits of corporate personhood.

Just as the "piercing the corporate veil" doctrine lets people sue owners who are using the corporate form as a smokescreen, perhaps something of the opposite effect could occur here, by which the sincere religious ethos of the owners suffuses their small corporation, or at least cannot be made impotent, i.e., unable to win exemptions from funding abortifacients, just because the owners are attached to a corporation.

However, there may be more than First Amendment-type rights and issues involved here. *Citizens United v. Federal Election Commission* (558 U.S. 310 (2010)) helped establish that corporations have substantial free speech rights, *see id. passim*. But there may or may not be exactly similar rights to avoid funding employee benefits just because the corporation does not like funding them. *Cf., e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (infringement of some economic rights may receive more lenient scrutiny than infringement of more fundamental rights such as speech). So, how much can an "economic right", i.e., the right not to fund abortifacients, be converted into a religious one? There may be real limits, which, thankfully, the Court may not have to address fully here, since Plaintiffs have far smaller companies than AT&T or General Motors, gigantic companies which hardly have a religious ethos.

Cf. also, e.g., the famous quip, "We reject the argument that because 'person' is defined for purposes of FOIA to include a corporation, the phrase 'personal privacy' . . . reaches corporations as

well. . . . We trust that AT&T will not take it personally." *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011) (Roberts, C.J.). That is, *see id.*, corporations are not identical to actual people, so to grant them identical rights in a facile manner is unworkable. But Amicus suspects the Court can find a balance and give relief to Plaintiffs without overturning *Smith* or granting corporations plenary power to evade obligations.

Untrammeled corporate power, after all, is a real danger, and part of why many people despise the *Citizens United* decision. The Constitutional Accountability Center's pro-Government amicus brief in 13-354 (Oct. 21, 2013), largely focusing, *see id. passim*, on the limited nature of corporate rights, opposes (though wrongly so) Plaintiffs' contentions. Too, the amicus brief of California et al. supporting the Government in 13-354 (Oct. 21, 2013) mentions that those who take the corporate form must accept its disadvantages as well as its advantages, *see id.* at 6; and that, *inter alia*, it could provide unfair competitive disadvantage to corporations who obey mandates, if other corporations are given unfair exemption from them, *see id.* at 6-7. Those objections are not enough to defeat Plaintiffs' claims; there may be alternate ways to provide abortifacient contraceptives to women, and in ways that do not give unfair competitive advantage to exempted corporations, *cf. infra* section VI. But California's objections, and those of the Constitutional Accountability Center, still have a grain of truth, in that corporate power needs restrictions.

Finally, even religious institutions or groups, one hates to say, can become too powerful or too exempt

from lawful oversight, as anyone burned to death by the Inquisition could tell us, or anyone who died on 9/11/2001 due to a religious-fanatic terrorist group. One of the causes of the French Revolution, it is said, was the unfair tax exemptions enjoyed by the Church in France, with peasants having to take up the slack. Quite obviously, Hobby/Conestoga are fine and upstanding religious people; but again, Amicus is making the point that religious exemptions from our laws must be carefully judged.

VI. EQUITY TOWARDS ALL PARTIES, AND SOME POSSIBLE SOLUTIONS

While Amicus is not arguing that those employers who want exemptions from funding contraceptives are *legally* obliged to offer something else in place of that missing funding, of roughly equal value to that funding, to employees: it might be an equitable consideration to this Court or others, if employers seeking exemptions did offer such "compensation", whether by reimbursement, voucher, refund, or what-have-you. Otherwise, in the "fervent Christian Scientist" scenario *supra*, that employer could omit *all* health benefits for employees, equal to approximately X substantial amount of dollars, and thus leave employees significantly worse off than employees at other firms which obey all federal mandates.

If, somehow, that employer really were allowed to provide no health benefits or insurance at all: then perhaps, in fairness, he should provide his employees some other benefit of roughly equal value, in a form to which he has no religious objection. And similarly, on a smaller and proportionate scale, for

employers who omit any particular part of health coverage, due to religious feeling. It may risk being, or seeming, Pharasaic to omit providing something because of religious reasons, without being "religious" enough to show the kindness of giving something else of similar value (though something sans taint of sin).

At the very simplest level, employers could refund part of an employee's compensation package (considering the employee's company or company-tied health benefits as being such) to the employee, if the employee wants contraceptives/abortifacients that the employer is unwilling to provide. Either

a) part of the amount that the employee paid, as part of her wages, into the employer's health care fund, in proportion to the total amount the employee paid into that fund, in the ratio that the cost of the contraceptive bears to the total cost of all the services the health care fund provides; or

b) the full amount of the cost of the contraceptive itself,

could be used as the figure. Obviously, an employer might rather pay back the amount in "a", *supra*, than the probably larger amount in "b". If only the amount in "a" was paid, though, the Government could take up the slack. I.e., the employee would use her "a"-amount refund to purchase a contraceptive, and the Government would pay anything needed beyond that amount.

Courts may debate whether "a" or "b" would be the better amount for the employer to pay, or some figure or ratio between those amounts, as

appropriately calculated. Part of that calculus could, say, include how well or badly employees are being treated already. For example, *see* the 1/10/2014 Br. for Pet'rs in 13-356, "Petitioners have provided generous health benefits to their approximately 950 employees, including preventive care coverage that went beyond what was required by law." *Id.* at 5. If, *see id.*, an employer is already going the extra mile, that may help lower any refund it might have to give otherwise. (Although some might counterargue, that an employee may not be using any "extra" services offered, anyway.)

It may seem too simple a solution to have employers refund some money. But if that is done, then employees are free to buy what contraceptives they want, with their own money, so that the employers are morally off the hook for what employees buy with it.

While Amicus writes on behalf of Plaintiffs, that does not mean that other persons should not receive equitable consideration either. Amicus does not want anyone to feel she has been cheated out of something owed to her. Perhaps a solution is craftable that can show due respect for all parties.

VII. GENDER EQUITY; AND, THE TIMING OF ABORTION: PRE-IMPLANTATION ABORTION IS NOT THE ONLY CHANCE TO ABORT

Indeed, if needless insensitivity has been shown to the unborn, one should not show needless insensitivity to women who wish to avoid pregnancy, either. Some feel that considerable gains have been made for women in the past few decades *vis-à-vis*

reproductive freedom, so that those gains, some feel, should not be reversed.

Amicus would not wish an unwanted pregnancy on anyone, but he would not wish any preborn child dead, either. So is compromise possible? and is gender equity possible?

As a first observation, one guesses that at least half of abortees are women (especially given some cultures' devaluing of female children), giving "violence against women" a new, if unheralded, meaning. Second, even if it is an inconvenience to a woman to let her own child live (*but see* Yitta Schwartz, *infra*, who managed to have thousands of descendants with pleasure), there are other ways to promote equality for women, such as extending the military draft to them, or banning sex-selective abortions (which may overly select female fetuses, not male ones, for death), or greater funding for rape kits so that more rapists can be caught, or promoting equal pay for equal work, or improving childcare possibilities. If Hobby/Conestoga have undertaken any special efforts toward gender equity (e.g., a serious effort to promote deserving women to higher positions), they may want to let us all know, soon.

And in the instant cases, the measures in section VI, *supra*, on possible refund or alternative funding for abortifacient contraceptives, can help promote equity for women.

An unwanted pregnancy can be a very ugly situation, as can an abortion. But abortion can always occur later on, after implantation of the embryo, if an abortifacient "contraceptive" is not available initially. So even if that abortifacient is not initially available, that is not the last chance to

abort. There may be multiple chances, later on. And *cf. Carhart*, *supra* at 4: "[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained", *id.* at 159 (Kennedy, J.); so that there may be a silver lining, for not having a quick abortion via abortifacient contraceptive, e.g., that the woman may later find herself happy to have the baby after all.

These factors should militate against Plaintiffs having to fund abortifacients.

VIII. ABORTIFACIENTS AS CANCER-CURE: A BAD AND BORGESIAN IDEA TO FORCE ON PLAINTIFFS

Also relating somewhat to gender equity: the pre-certiorari Brief of Amicus Curiae the Ovarian National Cancer Alliance in Support of Petitioners in 13-354 (undated) says, *see id. passim*, that exemptions from the Mandate would cause a lack of the abortifacient contraceptives and thus hamper the fight against ovarian and other cancers, since those contraceptives may act as risk-reducing treatments.

This should be taken seriously. However, another consideration comes from the following quote by Jorge Luis Borges:[10] "Among Paul Valéry's jottings, André Maurois observes the following: 'Idea for a frightening story: it is discovered that the only

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[10] *Available at*, e.g., William H. Gass, *Imaginary Borges*, N.Y. Rev. of Books, Nov. 20, 1969, http://www.nybooks.com/articles/archives/1969/nov/20/imaginary-borges/.

remedy for cancer is living human flesh. Consequences.'" *Id.*

Frighteningly enough, that scenario is more or less come to pass, that a purported way to prevent cancer is to take abortifacients which will indeed likely have the consequence of killing "living human flesh", *id.*, i.e., the embryo, as an effect of using those contraceptives. Quite a price to pay.

Of course, there may be other remedies for cancer. And many people will be able to afford to buy the abortifacient contraceptives on their own money anyway.

However, if there really is a need for those contraceptives as a counter-cancer measure, then instead of risking violating strict scrutiny, it may be right for, say, the Government to use the less restrictive means of providing those drugs itself, free or on discount, to women who cannot easily afford them. It is possible to be considerate both to those women and to Hobby/Conestoga.

IX. YITTA SCHWARTZ AND HER 2000 LIVING DESCENDANTS; OR, "EVERY EMBRYO IS A POTENTIAL PRESIDENT (OR JUSTICE)"

When Hobby/Conestoga want to avoid assisting abortion, by the way, they may not be thinking about just the present, but the future that an abortion might eliminate.

See, e.g., the *New York Times* story *God Said Multiply, and Did She Ever*[11], which remembers Yitta Schwartz, the highly fertile Satmar Hasidic woman who survived the Holocaust before moving to New York, and who, dying at 93, left an estimated 2000 living descendants. One does not know if any of her descendants had abortions ("perish the thought"); but what if Yitta had been aborted herself? All her descendants, and all *their* descendants (who could eventually number in the billions, scattered across the galaxies, for all we know), would never have existed. In scientific or science-fictional terms, there are whole "timelines", or "parallel universes" that would have been wiped out if Yitta had been destroyed in the womb, and thus, all her descendants with her.

Amicus shall note that of the tens of millions of preborns who perished following *Roe v. Wade* (410 U.S. 113 (1973)), many of them, or their children, may have made fine Supreme Court Justices, or fine Presidents, etc. By protecting Plaintiffs from funding abortifacients, then, we may not only protect Plaintiffs' consciences, we may even safeguard our Nation's future as well. *Cf.* U.S. Const. pmbl., "for ourselves and our *posterity*", *id.* (emphasis added).

See also Rabbi Jacob Neusner, *Matters of Opinion: Israel's Holocaust*, Christianity Today, Oct. 26, 1998. 12:00 a.m.,[12]

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[11] Joseph Berger, Feb. 19, 2010, corrected Feb. 28, 2010, http://www.nytimes.com/2010/02/21/nyregion/21yitta.html?_r=0.

[12] http://www.christianitytoday.com/ct/1998/october26/8tc085.html.

> We Jews are experienced in suffering murder, and we preserve the memory of the victims and their murderers. . . . That is why I ask, how is mass abortion in the State of Israel such as is practiced by the secular (but not the religious) portion of the Israeli population not comparable to mass murder of Jewish children in German Europe? . . . As the numbers mount up, when do considerations of volume enter in and validate calling the annihilation of millions of lives "a Holocaust"? I think they do. Here is a Holocaust today. Every Jewish child born in the State of Israel is a survivor of the Holocaust sustained by Israeli law.

Id. Amicus is not endorsing the Rabbi's viewpoint; some may find Neusner's viewpoint brilliant, others may find it offensive. But that fascinating viewpoint, see *id.*, gives some resonance to the poignancy of what would have happened if Yitta Schwartz (and descendants) were aborted. And the poignancy of how ugly it would be to force Plaintiffs to fund abortion.

X. EXPRESSIVE HELP AND EXPRESSIVE HARM IN *CASEY* AND *CARHART* RE ABORTION, THE STATE, THE INDIVIDUAL, AND RESPECT FOR THE UNBORN

Fleeing from "ugliness", *supra*: one of the loveliest things any Court has written is, "At the heart of liberty is the right to define one's own concept of

existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851 (Kennedy, O'Connor, and Souter, JJ.). That "right", *id.*, should be allowed to Plaintiffs as well. As quaint or otherworldly as some might think Plaintiffs' views are, Plaintiffs have a right not to privately subsidize others' abortions, since Plaintiffs think abortions disrespect "the mystery of human life", *id.*

Some may rejoin that that right in *Casey* pertains to individuals, not corporations; but in the present circumstances, the individual Plaintiffs who are so entwined with the running of their corporations in a moral way, should also have that right.

Part of this right is an expressive dimension, a method of moral messaging, which has precedent in *Casey* and elsewhere. Even the State is allowed to send a strong message of respect for preborn life, instead of just being a "neutral arbiter" or "inhuman bureaucracy": "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her [the mother] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term", *id.* at 872; "Regulations which do no more than create a structural mechanism by which the State . . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose", *id.* at 877.

And refusal to fund abortifacients is not a "substantial obstacle" to employees' rights, *id.*, considering all the alternative means of abortifacient delivery available, such as provision by the

Government. In fact, it is not a per se *obstacle* at all, since refusal-to-fund does not violate any "negative liberty", any right to be free from State coercion. It merely denies what at most might be called a "positive liberty", i.e., a State-created entitlement to abortifacient drugs or devices. The famous 24-hour waiting period upheld in *Casey*, *see id.* at, e.g., 844, is far more intrusive on pregnant women's "negative liberty" than a mere refusal to fund abortifacients.

Casey's protection of the State's expressive help (a term Amicus is coining in imitation of the phrase "expressive harm", i.e., harm the State does in the mere message a statute sends) in respecting unborn life protects the *State's* rights to do so; but it can also be extended to individuals like Plaintiffs and their expressive rights. Amicus believes that for Hobby/ Conestoga, this case is not mostly about the money, e.g., trying to "cheat" employees out of some quantum of money by some pretextual claim that Hobby/Conestoga are against abortifacients. Therefore, this case may be largely about expressive issues. (It is also about money to an extent, but Amicus has spoken about that, *see supra* part VI.)

Besides *Casey*, by the way, the more recent case of *Carhart*, *supra* at 4, notes, "The [Partial-Birth Abortion Ban] Act expresses respect for the dignity of human life. . . . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman", *id.* at 157;

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns,

> only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.
> . . . The medical profession . . . . may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. . . .
> . . . It was reasonable for Congress to think that partial-birth abortion . . . . "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world."

Id. at 159-60 (Kennedy, J.) (citation omitted). So, issues like "shock[ ], *id.* at 160, "appropriate role", *id.*, and "perver[sion]", *id.*, despite sounding rather moralistic, are of constitutional dimension, *see id.* (*Pace* the *Carhart* dissent of Justice Ruth Bader Ginsburg, decrying the Court majority's "'moral concerns'", which she puts in quotes, *id.* at 182, 186.) Hence, "shame issues" or "dishonor issues" related to the perceived horror of abortion are, per *Carhart*, issues which may allow Plaintiffs the legal right not to be ashamed, i.e., the right to avoid funding abortifacients, since Plaintiffs clearly wish "to show [their] profound respect for the life within the woman", 550 U.S. at 157.

XI. AMERICAN PUBLIC OPINION ON HAVING TO PAY FOR SOMEONE ELSE'S ABORTION

And traditionally, many Americans have not been happy about paying for other people's abortions. One popular-culture example is in the film *Dirty Dancing*,[13] despite that film's being, *cf. id.*, a relatively lax or "pro-choice" film about the morality of abortion (a hotel worker's abortion is not treated as a moral issue *per se* at all, but more as a "convenience" or "employability" issue). The main character (Frances "Baby" Houseman, played by Jennifer Grey) borrows money from her father, Dr. Jake Houseman (played by Jerry Orbach) to help the hotel worker get an abortion, but "Baby" (a strange name for an abortion advocate...) deliberately fails to tell him what the money is for, *see id.* He eventually finds out what the money was used for and is very unhappy about it and about Baby's breach of trust with him, *see id.* This scenario illustrates fairly well what many Americans think about abortion, i.e., "We won't stop you; but you better pay for it yourself." *See, e.g.*, the Hyde Amendment (seriously limiting federal funding for abortions).[14]

Having to pay for abortions through tax money may be considered too attenuated for Americans to have a legal claim about; but as for the more direct funding of abortion resulting from the Mandate, Plaintiffs should be able to avoid that without suffering crippling, unjust fees or penalties.

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[13] Directed by Emile Ardolino (Great American Films Limited Partnership/Vestron Pictures 1987)

[14] Pub. L. 94-439, tit. II, § 209, 90 Stat. 1434 (1976; amended 2009).

XII. *CASEY'S* WARPING OF THE STRICT-SCRUTINY STANDARD, AND HOW THAT FAVORS HOBBY/CONESTOGA

Casey also shows that abortion is considered so profound an issue that it was actually able to warp the former standard of scrutiny used on abortion regulations, strict scrutiny, to a lower level of scrutiny, "undue burden": "Abortion is a unique act. It is an act fraught with consequences[,] depending on one's beliefs, for the life or potential life that is aborted." 505 U.S. at 852; "Those cases [following *Roe v. Wade*] decided that any regulation touching upon the abortion decision must survive strict scrutiny", *id.* at 871; "In our view, the undue burden standard is [now] appropriate[.]" *Id.* at 876.

This being so, i.e., that Government is more easily able to stand up for unborn life now: then, private citizens should also be able to stand up for unborn life in a relatively untrammeled way, without coercion from the Mandate. Conversely, Government's weapons against Hobby/Lobby and other people of conscience should be fairly limited, after *Casey*'s show of respect for the unborn. Individuals have legal rights to abort, but should also have rights not to, and not to assist abortion.

In that light, some issues of individual conscience are explored below.

XIII. COMBATING THE LACK OF MORAL IMAGINATION AND SYMPATHY TOWARDS THE UNBORN AND THEIR DEFENDERS

Peter O'Toole: "I will not be a common man," he once raged. "I will stir the smooth sands of

monotony." Xan Brooks, *Peter O'Toole: a career in clips*, The Guardian (London), Dec. 15, 2013, 6:58 p.m.[15] Like cinema's "Lawrence of Arabia" (RIP), *cf. id.*, if somewhat less feisty, Hobby/Conestoga have decided to be individualists and follow their consciences, even if the State is not happy. And while the State apparently means well with its Mandate, the Mandate is overly coercive towards people of conscience.

Hobby Lobby and Conestoga seem very sincere about their beliefs; and even though they should not suffer for them, they seem be willing to, in a manner which may be seen as heroic in the old and noble style. *See, e.g.*, Georg Friedrich Handel's oratorio *Theodora* (1749) (Christian noblewoman sent to brothel by brutal Roman officials, then martyred by authorities for refusing to worship Roman gods); 2 *Maccabees*, ch. 7, *passim* (religious Jews under foreign occupation refuse to eat pork, even at the cost of their torture and deaths).

Devout Christians, Jews, and others may take horrible offense at performing certain actions, and it is untoward for the State to bludgeon them into doing so, when many alternatives abound.

Sometimes people like Plaintiffs are lampooned, falsely, as a bunch of Bible-thumping stupid hicks who hate sex. The mass media are frequent lampooners, *cf., e.g.*, British comedy troupe Monty Python's infamous song *Every Sperm Is Sacred* (from their film *Monty Python's The Meaning of Life*[16]),

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[15] http://www.theguardian.com/film/filmblog/2013/dec/15/peter-o-toole-dies-81-movies-clips.

[16] Directed by Terry Jones (Universal Pictures 1983).

which, *see id.*, mocks traditional Christian morality on reproductive matters. However, not only is Python's humor vulgar and insulting, it does not deal with a fertilized egg, which can develop into a human being in a way that a mere sperm cell, or unfertilized egg, cannot. To Plaintiffs, the embryo *is* sacred; and that's no joke.

Nor is death really funny, including an embryo's death. Though there may be a resurrection at the end of the world: until then, death is monstrously final. When someone is aborted, it is difficult to unabort that person. That's it; no second chance.

Death may be merely a joke on, say, the current FX network television series *American Horror Story: Coven*,[17] where, *see id.*, the titular coven's Supreme Witch (called "the Supreme"), Fiona Goode (played by Jessica Lange), can simply resurrect people from the dead, with a magic spell, at the drop of a pointed hat. By contrast, this (Supreme) Court cannot bring anyone back from the dead; but it can certainly show respect to those, such as Plaintiffs, who really do not want to kill people, especially seeing the horrific permanence and irreversibility of death.

All Plaintiffs are asking is to be spared the "red hands of Herod", complicity in slaughtering the innocent. *See Matthew* 2:16-18 (King Herod orders slaughter of children).

(One pictorial presentation of what may Plaintiffs feel abortion is like is Francisco Goya, *Saturn Eating*

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[17] 20th Century Fox Television/Ryan Murphy Prods. 2013-14.

His Children (1819-1823).[18] The ghastly vision, *see id.*, reminds us of the ugliness of filicide.)

If, after the above, it is still hard for some, including hardcore secularists, to realize how religious people (or even secularists with sympathy for the young) may ascribe humanity to an embryo, a description of the unimplanted embryo which draws on modern popular culture may offer some illustration.

The recent film *Gravity*,[19] *see id.*, features an astronaut, Dr. Ryan Stone (played by Sandra Bullock) who, after a disaster, is alive but stranded far above the Earth, and has to make great efforts to escape from the cold of space, back to the warm and welcoming planet below. Due partially to the heroic efforts of another astronaut, Matt Kowalski (played by George Clooney), she successfully manages to wend her way down to the womb of the earth.

Her journey is remarkably similar to that of the newly-fertilized embryo to the womb for implantation, hoping (if one may ascribe emotion) not to die before making it to safety.[20] The embryo,

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[18] *Available at*, e.g., http://eeweems.com/goya/saturn.html (courtesy of Erik E. Weems).

[19] Directed by Alfonso Cuarón (Esperanto Filmoj/Heyday Films/ Warner Bros. Pictures 2013).

[20] The theme of being tragically, perilously "lost in space" is also found in, e.g., David Bowie's 1969 (Philips/Mercury/RCA) hit rock song *Space Oddity*—a pun on "Space Odyssey"—about fictional astronaut Major Tom, in danger of death: "This is Ground Control to Major Tom/..../Your circuit's dead, there's something wrong/Can you hear me, Major Tom?/..../'Here am I floating round my tin can/Far above the Moon/Planet Earth is blue and there's nothing I can do'", *id.* Outer space makes a fine metaphor, *cf. id.*, for the inner space the embryo inhabits, the

zygote, or blastocyte, by whatever name, is lone; miniscule; vulnerable; and human, by the reckoning of many people.

What the Mandate does is to take people, Plaintiffs, who want to help (or not to hurt) the nascent, embryonic child, just as the Clooney character *supra* is trying to help the Bullock character; and punishes those people if they won't agree to hurt the embryo by preventing it from making its way to safety. (Or by funding someone to perform that act of prevention.)

Imagine if *Gravity* had been made with Kowalski trying to *prevent* Stone from getting back to Earth. That would be quite a shocker. And whereas that film is fiction, in real life, every day, the embryo, in every woman with a fertilized ovum, yearns for a womb in which to be implanted and make its way, nine months hence, to its full humanity out among us in the wide world. All that Plaintiffs are asking for is not to be involved in the cruelty of deliberately preventing that from happening. Amicus hopes that that is not too much to ask of the Court.

XIV. THE STRANGE CURVATURE OF SOME IDEAS FROM JURISTIC ACADEME ABOUT THE VALUE OF THE UNBORN

Another venue of insensitivity towards the unborn has been legal academia. One example is the famous (or to some, infamous) article, Laurence H. Tribe, *The Curvature of Constitutional Space: What*

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embryo that all of us have been at some point inside our mothers: facing a lonely death at any moment, beyond everyday human sight, and maybe beyond help, though not beyond being fatally hurt.

Lawyers Can Learn from Modern Physics, 103 Harv. L. Rev. 1 (1989), which featured, *see id.* at introductory n., a certain Barack Obama as a research/editorial aide. This essay, *see id. passim*, colorfully borrows from quantum and Einsteinian physics to present a "post-Newtonian" view of the Constitution. However, "pre-Newtonian" ideas such as consistency (or lack of it) may come into play as well.

The essay appropriately expresses dismay at the way the law treated an abused young man who died, Joshua DeShaney, *see id.* at, e.g., 8. Tribe concludes by bemoaning "the geometry of public indifference that will shape the lives of Joshuas yet unborn." *Id.* at 39.

The problem is that much of the essay is also marked by indifference to the *unborn*, *see id.*:

> [I]t seems extraordinarily difficult to justify the constitutional distinction . . . . between the state's power to *require* an abortion in certain circumstances and the state's power to *forbid* one. . . .
>
> . . . .
>
> The *Roe v. Wade* opinion . . . . conceptualized abortion not in terms of the intensely *public* question of the subordination of women to men through the exploitation of pregnancy, but in terms of the purportedly *private* question of how women might make intimately personal decisions about their bodies and their lives. That vision described a part of the truth, but only

> what might be called the Newtonian part.

Id. at 14, 16. These observations seem to miss the common-sense observation, one that is not "extraordinarily difficult", *id.*, that maybe human life is worth preserving, and various possible corollaries of that idea, e.g., that little children don't like to be killed; that horrific fetal pain may occur during fetal dismemberment or "termination"; etc. Maybe *that* "justifies] the constitutional distinction . . . . between the state's power to *require* an abortion[,] and the state's power to *forbid* one", *id.* at 14.

(*See* again, "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman", *Carhart*, 550 U.S. at 157.)

So for Tribe, *Roe v. Wade* was apparently too *right-wing* a decision, *see Curvature*, *supra*, at 16; interesting, seeing that c. 55 million abortions have occurred in America since that case. That figure could make an argument that America has been wandering in a moral desert for the forty-some years since *Roe*, but one suspects Tribe might not think so.

Tribe's ideas are not wholly valueless: of course, the idea of preventing the subordination of women is important. But maybe the idea of preventing the subordination of young women in the womb, or young men in the womb, by their needless killing, is not valueless either. That, too, is "a part of the truth", *Curvature*, *supra*, at 16.

Curvature's own, if unwitting, "indifference" towards the helpless and innocent tribe of the "unborn" *in general*, right after it laments the

"Joshuas yet *unborn*", *id.* at 39 (emphasis added), is not inspiring, either in level of consistency or in anything else.

Interestingly, Tribe's protégé, Mr. Obama, has been called out for amazing indifference to the unborn—and maybe even his own grandchildren at that. *See, e.g.*, David Brody, *Obama Says He Doesn't Want His Daughters Punished with a Baby*, CBN News, The Brody File, Mar. 31, 2008, 4:00 a.m.,[21] "At a town hall meeting [re contraception and other matters] . . . , Barack Obama told the crowd that he didn't want his daughters, 'punished with a baby.'" *Id.* "Punished"? Quite a term to use in regard to nascent human life.

Without drawing an explicit line of descent from 1) Tribe's *Curvature*, to 2) Obama's opinion of the unborn, and then 3) the abortifacient mandate—and its lack of exceptions—in the instant cases (passed by Obama and Democrats as part of "health reform"): one still notes that insensitivity about the unborn is unwelcome, whether from academics or anyone else. Amicus hopes a sensitive and consistent legal solution to Plaintiffs' prayers is available. After all, the Court has recently given us a nuanced solution in another case.

XV. SOME MODERATE LESSONS FROM THE *LITTLE SISTERS* ORDER OF JANUARY 24

From the Court's Order in 13A691 (Jan. 24, 2014), *Little Sisters of the Poor*, *supra* at 4, some on Plaintiffs' side may draw the automatic conclusion

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[21] http://blogs.cbn.com/thebrodyfile/archive/2008/03/31/obama-says-he-doesnt-want-his-daughters-punished-with-a.aspx.

that this is a good omen and that Plaintiffs must therefore get all relief desired. Those on the other side may call the order a mere temporary nuisance. Both may be wrong, judging by the order's text, in pertinent part:

> If the employer applicants inform [HHS] in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions[. A]pplicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

Id.

This is something of a compromise, *see id.*, as various commentators have noted; after all, the Little Sisters still have to send in *some* written information, which, someone could argue, is *itself* a "State-imposed requirement" and a "trigger" for the Government distributing contraceptives, and thus immoral. (Amicus is not arguing for that, simply saying that someone could.)

But it is also clearly a victory for the Little Sisters, as, *see id.*, they do not have to fill in the

particular form that was officially designated as a "trigger" for contraceptive distribution. At least, the quantum of perceived expressive harm for the Sisters has been lowered, call it "symbolic" victory or not.

Some lessons to be drawn here include the value of creative solutions and moderation. The Court avoided an extreme decision for either side. It may be good if this happens again.

(The January 27, 2014 pro-Government amicus brief in 13-354 of the Freedom from Religion Foundation et al. recommends, *see id. passim*, the *overturning of RFRA*. Amicus feels this sort of immoderate proposal is a guide as to the spirit the Court should *not* have in these cases.)

XVI. IF THERE IS A FINE, IT SHOULD BE MINIMAL, CONSIDERING CIRCUMSTANCES

After all this, the Court may still disagree with Plaintiffs and believe there should still be a fine/penalty for noncompliance with the Mandate. In that event, Amicus recommends that there be no more than a nominal fine, even a $1 essentially-symbolic fine.

This is not to show favoritism to corporations or to flout the law, but because Plaintiffs have shown such revulsion to providing abortifacients, and because there are so many other ways to provide people abortifacients. Thus, due process and fairness would militate that a fine be as low as reasonably possible. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (due process may limit amount of damages paid).

This fine may interrelate with the equity factors discussed in section VI, *supra*. For example, if the Court were to rule that the fine will be the same as, or can be no greater, than the total amount that all employees of a Mandate-exempted company spend, out-of-pocket, or with a Government loan, for contraceptives, that might seem fair to some. Or alternately, that the fine can be no greater than the amount of employees' wages that would have been spent to pay insurers for contraceptive coverage, coverage that is denied to those employees.

CONCLUSION

Amicus respectfully asks the Court to uphold the court of appeals' judgment in *Hobby Lobby*, and to reverse the court of appeals' judgment in *Conestoga*, considering whatever issues or equities need to be considered along the way; and humbly thanks the Court for its time and consideration.

January 28, 2014 Respectfully submitted,

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